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JUN 23 1993

Before The

COHEN & BERFIELD

Federal Communications Commission

Washington, D.C. 20554

In The Matter Of

MARTHA J. HUBER, *et al.*,

MM Docket No.

93-51

For Construction Permit for a
New FM Station on Channel 234A
in New Albany, Indiana

TO: The Honorable Richard L. Sippel
Administrative Law Judge

Request for Permission to File Appeal

Rita Reyna Brent ("Brent"), by her attorneys and pursuant to 47 C.F.R. § 1.301, respectfully requests permission of the Presiding Judge to appeal the *Memorandum Opinion and Order* released June 17, 1993, FCC 93M-374 ("Order"), adding financial issues against Brent. In support of this request the following is shown:

1. The Presiding Judge is respectfully urged to revisit his *Order* designating broad financial qualifications issues against Brent. The only allegedly "substantial and material question" raised in the enlargement petition was whether Brent, a sole applicant relying on assets jointly held with her husband Robert, had a balance sheet and income documents on hand at the time of financial certification. Brent's Declaration affirms that she had such Form 301 documents on hand. She thereby facially refuted Huber's allegation and Huber's Reply does not take issue with Brent's assurance. It speculates and surmises, asserting, *inter alia*,

Huber's disbelief that "the Brents" ¹ are rich enough to fund Brent's proposal.

2. The scope of the issues is even broader than Huber sought. The Presiding Judge has required Brent not only to prove her financial qualifications, but also to justify her estimated costs of construction and operation ("Nor is there any reference made to an estimate of the costs").² Huber has never questioned the adequacy of Brent's cost estimates or suggested that prior to certifying Brent did not engage in serious and reasonable efforts to ascertain them.³

3. Brent thought she was being faithful to Huber's repeated assertions that words in litigative pleadings should have their plain-English meaning. It is apparent that since the *Order* does not embrace Huber's claim, the Presiding Judge accepted Brent's and her counsel's explanation that there was never any intent to assert that Brent lacked Form 301 documents at the time she certified. In other words, a pleading opposing Huber's motion to compel production did not contain what Huber characterized as an "admission against interest." Thus Brent's Declaration carefully tracks not only Huber's charge that Form 301 documents were lacking, but also the language of Instruction D.(3)(a) relied on by Huber, which provides that a certifying applicant must have

¹ Huber has always recognized what Section III of Brent's Form 301 makes plain, that joint funds will be used. See, e.g., Huber Petition to Enlarge Issues at 3; Huber Reply at 3, 6. See also Attachment A, hereto, page 22 of Brent's deposition conducted by Huber's counsel on May 26, 1993.

² The Presiding Judge makes this observation notwithstanding that estimates of costs are not "301 documents." See Form 301 Instruction D.(3)(a).

³ If the Presiding Judge denies this Appeal, he is urged to limit the scope of the issues to a determination whether Brent and her spouse had combined liquid assets to build and operate as proposed.

"on hand" a "current balance sheet." Thus, Brent used precisely this terminology in her Declaration.

4. The Presiding Judge makes clear at Paragraph 7 of the *Order*, his concern and the reason why he enlarged. He states that "there is no identification of those documents [*i.e.*, "a current balance sheet"] as being joint financials which would reflect the combined liquid assets of Brent and her spouse." Brent (and her counsel) were surprised and dismayed by this finding. Brent's financial source is funds held jointly with her husband—as shown in her application, as she testified in deposition, and as acknowledged by Huber. For the record, Brent makes clear in the attached Declaration that the current balance sheet she had on hand at certification was a joint balance sheet of her and her husband.

5. Brent appreciates the Presiding Judge's belief that the issues ~~he has specified can be met with a minimum of proof at hearing, but~~

conserved, and this proceeding will not become unnecessarily complicated.⁴

Accordingly, Brent respectfully asks the Presiding Judge to grant

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
FCC 93M-247 31482

In re Applications of	)	MM DOCKET NO. 93-51
MARTHA J. HUBER	)	FILE NO. BPH-911114ME
RITA REYNA BRENT	)	FILE NO. BPH-911115MC
MIDAMERICA ELECTRONICS SERVICE,)	
INC.	)	FILE BPH911115ML
STATION COMMUNICATIONS, INC.	)	FILE NO. BPH-911115MU
For Construction Permit for a)	
New FM Station on Channel 234A)	
in New Albany, Indiana)	

DEPONENT:	Rita Reyna Brent
DATE:	May 26, 1993
REPORTER:	Kitty Karem

COULTER, KAREM & McBRIDE

1 in ruling on our motion for documents the judge -- there
2 was one small area where the judge said we could try to
3 clarify some matters on a deposition.

4 MR. SOLOMON: You ask slowly, give me
5 time to object.

6 Q In your application it's indicated that
7 the funds to construct and operate the station will come
8 from funds of you and your husband; is that correct?

9 A That's correct.

10 Q And I'll ask you will your husband have
11 any ownership interest in this station?

12 A No.

13 Q And can you explain why, although he's
14 providing funds, he won't have any ownership interest in
15 the station?

16 A It's mine. It's mine to run. It's my
17 business. He has a business to run.

18 Q That's this PP --

19 A PPB, Inc.

20 Q Is that his full-time occupation?

21 A Yes, he's Mr. B of PPB.

22 Q Did you discuss any aspect of the New
23 Albany application prior to the filing with Dorothy Ott or
24 Lee Stinson?

25 A No. Dorothy is aware that I filed.

Attachment B

DECLARATION OF RITA REYNA BRENT

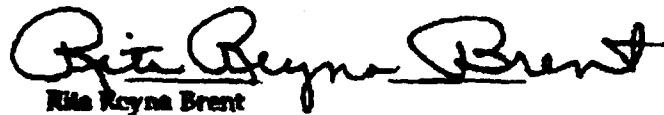
I, Rita Reyna Brent, do hereby declare as follows:

In my Declaration of May 26, 1993, I stated that when I signed my application I had on hand a current balance sheet.

I hereby affirm that such balance sheet was a joint balance sheet of Rita Reyna Brent and Robert W. Brent, my husband.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct of my personal knowledge.

Executed this 21 day of June 1993.


Rita Reyna Brent

A4 -> A4

ATTACHMENT 7

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HALEY, BADER & POTTS

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HENRY A. SOLOMON
ADMITTED IN VA AND D.C.

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JUN 28 1993

COHEN & BERFIELD

OUR FILE NO.
1024-101-60

June 28, 1993

BY HAND

Morton L. Berfield, Esq.
Cohen & Berfield
1129 20th Street, N.W.
Washington, D.C. 20036

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FCC 90MAR22 1990

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

1759
COHEN & BERFIELD

In re Applications of	)	MM DOCKET NO.- 89-292
)	
MARK ALLEN BODIFORD	)	File No. BPH-871203MA
)	
PLEASURE ISLAND BROADCASTING, INC.	)	File No. BPH-871203MO
)	
J. MCCARTHY MILLER	)	File No. BPH-871203NM
)	
PETE WOLFF, III	)	File No. BPH-871203NW
)	
For Construction Permit for a)	
New FM Station on Channel 298A)	
in Orange Beach, Alabama)	

MEMORANDUM OPINION AND ORDER

Issued: February 27, 1990;

Released: February 28, 1990

Background

1. This is a ruling on Motion To Enlarge Issues filed on December 27, 1989, by Pete Wolff III ("Wolff"). An Opposition was filed on January 17, 1990, by Mark Allen Bodiford ("Bodiford"). Wolff filed his Reply pleading on January 29, 1990.

2. Wolff seeks to add qualifying issues against Bodiford to determine whether two bank letters on the stationery of AmSouth Bank, N.A., bearing date of November 16, 1987 were falsely "manufactured" by Bodicker and whether Bodicker gave false deposition testimony regarding those letters. In addition, Wolf seeks financial certification and financial qualifying issues against the applicant.

Facts

3. Bodiford was at one time a professional underwater diver. He experienced a serious accident out of which arose a negligence claim which settled in his favor for \$457,000.00. Bodiford notes that those funds were disclosed to Wolff in deposition but they were not taken into account by Wolff in the allegations to support the issues.

4. Wolff asserts that the Foley branch of the AmSouth Bank was not opened until March 25, 1988, a date almost four months after the issuance of the bank letter. The facts are not altogether clear on how the letter was obtained from the Foley branch before it was opened for business. But of equal importance is the disclosure by Bodiford in his deposition that he did not prepare any cost estimates before he certified to his financial ability on December 3, 1987. Also, Bodiford testified that he does not recall any discussions with the bank officials about collateral for any loan.

5. Bodiford claims that while he himself did not calculate cost estimates, he relied on a long-time personal friend and station owner, Mr. Grider, and a consulting engineer, Mr. Price. Bodiford's deposition testimony is consistent:

Q. - - - do you have in your mind a cost figure for constructing and operating - - -?

A. Yes, I do.

Q. And how did you determine that cost figure.

A. It was done with the aid of the manual that was provided me by the FCC and with conversations with various experts in the industry.

(Bodiford Depo. at 70-71.) Bodiford then went on to identify Grider and Price. Id.

6. The Declaration of Bodiford that was submitted with his Opposition discloses that before he certified, Bodiford had obtained some Harris equipment prices. He discussed those prices with Price, as well as some other cost figures, and he relied on Price's construction estimate of \$100,000. He also obtained from Grider an estimate of operating costs of \$50,000 before he certified.

7. Bodiford further states in his Declaration that he relied on a financial statement that he himself prepared on November 18, 1987, a few weeks before he certified. Bodiford's statement showed \$93,000 in cash, 35,000 in a money market fund, \$25,500 in listed securities, a \$50,000 CD and \$8,200 in a case savings account at AmSouth Bank. Bodiford also had a fully-paid condominium assessed at \$76,500. His only liability was an installment loan in the amount of \$2,200. Bodiford claims total liquid assets of \$180,000.

8. With respect to the bank letter, Bodiford attests in his Declaration to the fact that he had deposited \$240,000 with the AmSouth Bank on November 16, 1987, at which time he met Mr. Moore. At that time, Moore was with AmSouth's Gulf Shore branch. Bodiford told Moore he was applying for a radio station and needed a bank commitment. Moore gave Bodiford a written commitment for \$70,000 on-the-spot. But later, an experienced communications counsel told Bodiford that the letter was not sufficiently firm for "reasonable assurance." Moore thereupon agreed to a modified letter which was delivered to Bodiford on November 16, 1987. Then Bodiford lost the letters. Moore had no copies. But Moore replaced them with the two that were issued

Discussion

10. There is a substantial question raised by the facts presented as to whether on March 12, 1987, Bodiford had a "reasonable assurance" of liquid funds sufficient to support construction and three months' operations without revenue. Bodiford relies in part on a condominium as one substantial asset. But there is no accompanying appraisal as required. See Opal Chadwell, 4 F.C.C. Rcd 1215 FCC 89-7 (Comm'n 1989). Bodiford also failed to take into account costs of prosecution and costs of a site which raises a substantial issue of fact about accuracy of costs. Finally, Bodiford relies on two bank letters which were not in existence when certification was made. While Bodiford offers an explanation about lost letters, the fact that Moore also lost his copies makes the story suspect. At least the issue needs to be aired fully on-the-record before the trier of fact.

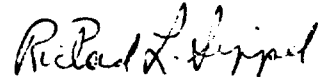
11. The Review Board has recently remanded a case and ordered the hearing of a financial issue because changed circumstances occurred after certification and there was a failure to report under §1.65. See Weyburn Broadcasting Limited Partnership, 5 F.C.C. Rcd ____, Review Bd Slip Op. FCC 90R-13, released February 15, 1990. Bodiford should have reported the circumstances of the "lost" letters of commitment and the circumstances surrounding their possibly non-timely disclosure in discovery also must be ex-

- D. To determine whether Bodiford has violated \$1.65 of the Commission's Rules by failing to report material information concerning his financial qualifications with respect to lost commitment letters and, if so, the effect thereof on his basic qualifications to be a Commission licensee.
- E. To determine whether Bodiford abused Commission processes by failing to disclose in discovery the fact and circumstances of the lost commitment letters and by failing to timely disclose Mr. Moore's written note and, if so, the effect thereof on his basic qualifications to be a Commission licensee.

The burdens of proceeding and the burdens of proof ARE ASSIGNED to Mark Allen Bodiford.

A schedule for discovery and the exchange of trial briefs shall be assigned in the course of the hearing.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

APPENDIX RE DISCOVERY

If this petition to enlarge issues is granted, Huber will take the depositions of the following persons: Rita Brent, Robert Brent, Joseph R. Edwards, Samuel C. Lockhart, George Owen, Patricia B. Harrison, Dennis Ott, and Dorothy Ott.¹ Huber also reserves the right to notice the deposition of any other person whose identity is subsequently disclosed.

Huber also requests that Brent produce the documents listed below in accordance with the definitions and instructions listed below. Such documents shall be produced within ten days after the release of an order granting this petition to enlarge issues, and they shall be produced at the offices of Cohen and Berfield, P.C., 1129 20th Street, NW, Suite 507, Washington, DC, 20036.

Definitions and Instructions

As used in these documents requests, the terms listed below have the following meanings:

1. "Brent" shall mean Rita Reyna Brent and her attorneys, accountants, agents, principals, employees and representatives.

¹ To the extent Huber is able to obtain pertinent facts through depositions on the existing financial qualifications issues or other means, some of these depositions may not be necessary.

2. "Document" means without limitation the original (or if the original is not in your possession, custody, or control, an identical copy), or any nonidentical copy because of notations made on or attachments to such copy or otherwise, or any draft of any letter, memorandum, telegram, telex, report, record, study, handwritten notes, working paper, chart, paper, bill, receipt, index, business record, minutes,

and any other document or information in any form or medium, whether written, printed, or otherwise, and whether or not it is in your possession, custody, or control.

7. These document requests call for the production of all documents within the possession, custody, or control of Brent, her husband, other principals, and any officers, directors, shareholders, agents, employees, advisors, or any other person under the control of any such party.

8. If any requested document is withheld from production on the basis of a privilege, all privilege claims shall be made using the procedures established by Paragraph 6 of the Prehearing Conference Order, FCC 93M-114 (released March 19, 1993).

9. These requests are continuing in character. The parties are under a continuing obligation to supply documents responsive to these requests which are discovered during or after discovery in this proceeding. These documents should be provided within 10 days after they are obtained or discovered.

10. Documents responsive to these requests which are on file with the Federal Communications Commission ("FCC" or "Commission") need not be produced. They may instead be identified by document title and date, the call letters of the station, or file numbers of the docket or application.

11. If any document requested is currently unavailable, an explanation should be provided as to why it is now unavailable.

Documents Requested

1. All documents relating to the acquisition, loss, or retention of the availability of the transmitter site proposed by Brent.

2. All documents relating to any communications between Brent and (1) Samuel Lockhart, (2) Patricia Harrison, or (3) any agent or representative of Mr. Lockhart or Ms. Harrison.

3. All documents relating to any decision not to report the sale of Brent's transmitter site or the loss of reasonable assurance of site availability.

4. All documents relating to the loss or misplacement of the balance sheet referred to by Brent in her declarations dated May 26, 1993 and June 21, 1993.

5. All documents relating to any decision not to report the loss or misplacement of the balance sheet referred to by Brent in her declarations dated May 26, 1993 and June 21, 1993.

CERTIFICATE OF SERVICE

I, Linda Gibson, do hereby certify that on the 6th day of July 1993, a copy of the foregoing "Second Petition To Enlarge Issues Against Rita Reyna Brent" was sent first-class mail, postage prepaid to the following: